

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

| | | |
|----------------------------|---|-----------------------------|
| STATE OF OKLAHOMA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 05-cv-329-GKF(SAJ) |
| |) | |
| TYSON FOODS, INC., et al., |) | |
| |) | |
| Defendants. |) | |

**STATE OF OKLAHOMA'S RESPONSE TO MOTION OF POULTRY PARTNERS, INC.
FOR PERMISSION TO FILE BRIEF AS *AMICUS CURIAE* IN OPPOSITION TO THE
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), hereby submits this response in opposition to the Motion of Poultry Partners, Inc. ("Poultry Partners") for Permission to File Brief as *Amicus Curiae* in Opposition to the Plaintiff's Motion for Preliminary Injunction [DKT #1398] ("*Amicus* Motion"). Not only is the subject of the proposed *amicus* brief not analytically useful to the Court, but also the *Amicus* Motion is submitted by a friend of Defendants and not a friend of the Court. Allowance of the *Amicus* Motion in such circumstances would be contrary to principles governing *amicus curiae* participation. Accordingly, the *Amicus* Motion should be denied.

I. Poultry Partners' *Amicus* Motion should be denied because the proposed *amicus* brief would not be analytically useful and it is submitted by a friend of Defendants and not a friend of the Court

The principles governing the grant to participate as *amicus curiae* are well-settled.

"There is no inherent right to file an *amicus curiae* brief with the Court. It is left entirely to the discretion of the Court." *Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1178 (D. Nev. 1999);

Fluor Corp. & Affiliates v. United States, 35 Fed. Cl. 284, 285 (1996); *Waste Management of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995). "A court may grant leave to appear *amicus curiae* if it deems the proffered information timely and useful." *Hawksbill Sea Turtle v. FEMA*, 11 F. Supp. 2d 529, 541 (D.V.I. 1998), quoting *Liberty Lincoln Mercury v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993).

Not only must the proffered information be timely and useful, but the movant seeking to participate as *amicus curiae* "must be a friend of the court and not a friend of a party to the cause." *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982). As explained by the *Leigh* court:

Historically . . . an *amicus curiae* is an impartial individual who suggests the interpretation and status of the law, gives information concerning it, and whose function is to advise in order that justice may be done, rather than to advocate a point of view so that a cause may be won by one party or another. . . . Indeed, if the proffer comes from an individual with a partisan, rather than impartial view, the motion for leave to file an *amicus* brief is to be denied, in keeping with the principle that an *amicus* must be a friend of the court and not a friend of a party to the cause. C. Rembar, *The Law of The Land* 330 (1980). . . . The privilege of being heard *amicus* rests in the discretion of the court which may grant or refuse leave according as it deems the proffered information timely, useful, or otherwise, 3A C.J.S. *Amicus Curiae* § 3

Leigh, 535 F. Supp. at 420-22 (citation omitted).

Furthermore, unnecessary *amicus* submissions have been criticized as imposing a "real burden on the court system," "impos[ing] a burden of study and the preparation of a possible response on the parties," "more often than not sponsored or encouraged by one or more of the parties," possibly "intended to circumvent the page limitations on the parties' briefs," and "attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome." *National Organization for Women, Inc. v. Scheidler*, 223 F.3d 615, 616-17 (7th Cir. 2000).

Poultry Partners' *Amicus* Motion contravenes these principles in at least two ways, either of which supports the denial of its *Amicus* Motion. First, the *Amicus* Motion should be denied because the proposed *amicus* brief would lack utility inasmuch as it would fail to address facts or legal principles that are relevant to the Court's consideration of the State's motion for a preliminary injunction. In this regard, participation as *amicus curiae* is not permitted where the proposed submission is not useful to the Court. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 282 F. Supp. 2d 1271, 1274 (D.N.M. 2002) (denying leave to file *amicus* brief for lack of utility); *Long*, 49 F. Supp. 2d at 1177-78 (same); *Hawksbill Sea Turtle*, 11 F. Supp. 2d at 541 (denying leave because proposed *amicus* submission "lack[ed] utility since it does not directly address the facts or law at issue in this case").

Here, Poultry Partners seeks *amicus* participation for one reason, namely, so that the "economic impacts on the poultry farming community can be explained to this Court by those most directly affected." *See Amicus* Motion, p. 2. The alleged "economic impacts" are irrelevant to the State's motion for preliminary injunction. An injunction's "economic impact" is not an appropriate consideration for the Court when adjudicating a governmental plaintiff's request for an injunction. As explained in the State's motion for preliminary injunction, "the law of injunctions differs with respect to governmental plaintiffs (or private attorneys general) as opposed to private individuals. Where the plaintiff is a sovereign and where the activity may endanger the public health, 'injunctive relief is proper, without resort to balancing.' *Illinois v. Milwaukee*, 599 F.2d 151, 166 (7th Cir.1979), *rev'd on other grounds*, 451 U.S. 304, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981)." *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 337-38 (4th Cir. 1983); *see also EPA v. Environmental Waste Control, Inc.*, 917 F.2d 327, 332 (7th Cir. 1990) (same); *United States v. Bethlehem Steel Corp.*, 38 F.3d 862, 868 (7th Cir. 1994)

(same); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1359 (5th Cir. 1996) ("when the United States or a sovereign state sues in its capacity as protector of the public interest, a court may rest an injunction entirely upon a determination that the activity at issue constitutes a risk of danger to the public"). Because "balancing" is not appropriate when adjudicating a governmental plaintiff's request for an injunction,¹ Poultry Partners' proposed *amicus* brief on the subject of economic impact does not offer insights that are appropriate for the Court's consideration. Thus, Poultry Partners cannot satisfy the utility requirement of *amicus* participation, and its *Amicus* Motion must be denied.

Second, contrary to the principles governing *amicus* participation, Poultry Partners is a friend of Defendants, not a friend of the Court. As stated above, to participate as *amicus curiae*, one "must be a friend of the court and not a friend of a party to the cause." *Leigh*, 535 F. Supp. at 420. Here, Poultry Partners is undisputedly a friend of Defendants. The following are examples of the close relationship between Defendants and Poultry Partners:

- Defendants were instrumental in Poultry Partners' formation and provided initial funding of \$50,000 in March 2005. *See* Ex. A² at A-8 (Defendants' corporate representatives present at Poultry Partners' formation meeting; growers requested "seed" money from integrators to "help legitimize the Poultry Farmers"); Ex. A at A-17 ("the companies were proposing to provide \$50,000 initially"); Ex. A at A-1 (memo from Tyson's senior vice president to Tyson growers, stating "to show our general support . . . we, and the other integrators, will be making a financial contribution to help get the organization [Poultry Partners] started"; Ex. A at A-2 (same individual from Tyson stating "we've been supporting Poultry Partners, contributing to getting them organized, giving money to their legal defense fund, etc. etc. They are our friends"); Ex. B, Dep. Tr. of Bev Saunders at 177:2-9, 187:4-24, 191:16-19.

¹ In fact, it is noteworthy that this Court has denied discovery pertaining to the potential adverse economic consequences of the State's case on contract growers and the economies of Oklahoma and Arkansas on relevancy grounds. *See* October 24, 2007 Opinion and Order [DKT #1336], p. 3 ("The motion [DKT #1221] is denied as to Interrogatories numbered 7, 8 and 9 on grounds of relevance").

² For ease of reference, Exhibit A attached hereto is a compilation of documents.

- Poultry Partners' Board of Directors is comprised of growers for Defendants. *See* Ex. A at A-39 to A-40 (current listing of Poultry Partners' board members, available at <http://poultrypartners.com/about> (visited December 13, 2007)). For example, its Board includes as President, Jerry Hunton, a grower for Simmons Foods, Ex. A at A-43, as Director, Steve Bryan, a grower for Tyson, Ex. A at A-45, as Vice President, Randy Allen, a grower for Peterson Farms, Ex. C at 15:18-20, and as Director, Tom McCain, a grower for Tyson, Ex. A at A-41.
- Poultry Partners' members are growers for the Defendants. *See, e.g.*, Ex. D, Dep. Tr. of Robert Schwabe, II at 7:5-14, 130:3-5 (grower for Defendant Cargill is member of Poultry Partners); Ex. C, Dep. Tr. of Randy Allen at 15:18-24, 52:2-12 (grower for Defendant Peterson Farms is member of Poultry Partners); Ex. E, Dep. Tr. of Joel Reed at 8:12-22, 79:10-11 (grower for Defendant Simmons is member of Poultry Partners); Ex. F, Dep. Tr. of Bill Ray Anderson at 8:19-25, 186:15-16 (grower for Tyson Defendant is member of Poultry Partners); Ex. G, Dep. Tr. of Steve Butler at 10:1-2, 140:24-141:5 (grower for Defendant Tyson is member of Poultry Partners); Ex. H, Dep. Tr. of Jim Lance Pigeon at 16:2-9, 129:7-10 (grower for Tyson Defendant is member of Poultry Partners).
- Poultry Partners' Manager has been a grower for Defendant Peterson Farms. Manager Bev Saunders has been a grower for Peterson Farms. *See* Ex. B, Dep. Tr. of Bev Saunders at 11:6-11, 33:11-15, 34:12-35:14.
- Poultry Partners' counsel has submitted draft pleadings to Defendants' counsel for their comment prior to filing. *See* Ex. A at A-9 to A-10 ("Just so that we don't step on someone else's strategy, we provide you with this advance draft of the supplemental reply we plan to file tomorrow. Does this represent a problem to any of your clients' positions?").
- Poultry Partners has coordinated responding to third party subpoenas with Tyson's counsel. *See* Ex. A at A-14.
- Poultry Partners and Defendants work in conjunction and refer to one another as "friends" and "partners." *See* Ex. A at A-4 (email from Poultry Partners' manager, Bev Saunders, calling Defendants' corporate representatives and counsel "Friends"); Ex. A at A-6 ("Partners").
- Representatives of the Defendants attend Poultry Partners meetings. *See, e.g.*, Ex. A at A-17 (minutes showing representatives of Simmons and Peterson present at Poultry Partners meeting); Ex. A at A-21 (email reflecting same).
- Poultry Partners and Defendants work together in soliciting Poultry Partners membership. *See* Ex. A at A-18 to A-21.
- Defendant Peterson Farms has objected to discovery into its communications with Poultry Partners on the grounds of the attorney-client privilege or common interest privilege. *See* Ex. A at A-37 (objecting to Topics 28 and 29 on A-33).

Where, as here, "the proffer comes from an individual with a partisan, rather than impartial view, the motion for leave to file an amicus brief is to be denied, in keeping with the principle that an amicus must be a friend of the court and not a friend of a party to the cause." *Leigh*, 535 F. Supp. at 420. In sum, the close ties between Defendants and Poultry Partners further require the denial of the *Amicus* Motion.³

II. Conclusion

For the foregoing reasons, the Motion of Poultry Partners for Permission to File Brief as *Amicus Curiae* [DKT #1398] should be denied.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
ATTORNEY GENERAL
Kelly H. Burch OBA #17067
J. Trevor Hammons OBA #20234
Tina Lynn Izadi OBA #17978
Daniel P. Lennington OBA #21577
ASSISTANT ATTORNEYS GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

/s/ Richard T. Garren

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581

³ It should not be overlooked that given the number of Defendants responding to the State's motion for preliminary injunction, and the anticipated intensity of their response briefs, the proposed *amicus* brief could not present anything of relevance which will not be more than adequately covered by Defendants.

D. Sharon Gentry OBA #15641
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis Werner Bullock OBA #1305
James Randall Miller OBA #6214
MILLER, KEFFER & BULLOCK
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

David P. Page OBA #6852
BELL LEGAL GROUP
P. O. Box 1769
Tulsa, Ok 74101-1769
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
MOTLEY RICE, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick

(admitted *pro hac vice*)
MOTLEY RICE, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

| | |
|--|--------------------------------|
| W. A. Drew Edmondson, Attorney General | fc_docket@oag.state.ok.us |
| Kelly H. Burch, Assistant Attorney General | kelly_burch@oag.state.ok.us |
| J. Trevor Hammons, Assistant Attorney General | trevor_hammons@oag.state.ok.us |
| Tina Lynn Izadi, Assistant Attorney General | tina_izadi@oag.state.ok.us |
| Daniel P. Lennington, Assistant Attorney General | daniel.lennington@oag.ok.gov |

| | |
|---|----------------------------|
| M. David Riggs | driggs@riggsabney.com |
| Joseph P. Lennart | jlennart@riggsabney.com |
| Richard T. Garren | rgarren@riggsabney.com |
| Douglas A. Wilson | doug_wilson@riggsabney.com |
| Sharon K. Weaver | sweaver@riggsabney.com |
| Robert A. Nance | rnance@riggsabney.com |
| D. Sharon Gentry | sgentry@riggsabney.com |
| RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS | |

| | |
|--------------------------|--------------------------------|
| Louis Werner Bullock | lbullock@bullock-blakemore.com |
| James Randall Miller | rmiller@mkblaw.net |
| MILLER, KEFFER & BULLOCK | |

| | |
|------------------|---------------------|
| David P. Page | dpage@edbelllaw.com |
| BELL LEGAL GROUP | |

| | |
|------------------------|-----------------------------|
| Frederick C. Baker | fbaker@motleyrice.com |
| Lee M. Heath | lheath@motleyrice.com |
| Elizabeth C. Ward | lward@motleyrice.com |
| Elizabeth Claire Xidis | cxidis@motleyrice.com |
| William H. Narwold | bnarwold@motleyrice.com |
| Ingrid L. Moll | imoll@motleyrice.com |
| Jonathan D. Orent | jorent@motleyrice.com |
| Michael G. Rousseau | mrousseau@motleyrice.com |
| Fidelma L. Fitzpatrick | ffitzpatrick@motleyrice.com |

MOTLEY RICE, LLC
Counsel for State of Oklahoma

| | |
|---|----------------------|
| Robert P. Redemann | rredemann@pmrlaw.net |
| Lawrence W. Zeringue | lzingue@pmrlaw.net |
| David C. Senger | dsenger@pmrlaw.net |
| PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C. | |

| | |
|------------------------|----------------------------------|
| Robert E Sanders | rsanders@youngwilliams.com |
| Edwin Stephen Williams | steve.williams@youngwilliams.com |
| YOUNG WILLIAMS P.A. | |

Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.

| | |
|---|------------------------------|
| John H. Tucker | jtucker@rhodesokla.com |
| Theresa Noble Hill | thill@rhodesokla.com |
| Colin Hampton Tucker | ctucker@rhodesokla.com |
| Leslie Jane Southerland | ljsoutherland@rhodesokla.com |
| RHODES, HIERONYMUS, JONES, TUCKER & GABLE | |

| | |
|-------------------|--------------------------|
| Terry Wayen West | terry@thewestlawfirm.com |
| THE WEST LAW FIRM | |

| | |
|---------------------------|--------------------|
| Delmar R. Ehrich | dehrich@faegre.com |
| Bruce Jones | bjones@faegre.com |
| Dara D. Mann | dmann@faegre.com |
| Krisann C. Kleibacker Lee | kklee@faegre.com |
| Todd P. Walker | twalker@faegre.com |
| FAEGRE & BENSON, LLP | |

Counsel for Cargill, Inc. & Cargill Turkey Production, LLC

| | |
|----------------------|------------------------------|
| James Martin Graves | jgraves@bassettlawfirm.com |
| Gary V Weeks | gweeks@bassettlawfirm.com |
| Paul E. Thompson, Jr | pthompson@bassettlawfirm.com |
| BASSETT LAW FIRM | |

| | |
|----------------------|-------------------------|
| George W. Owens | gwo@owenslawfirmnpc.com |
| Randall E. Rose | rer@owenslawfirmnpc.com |
| OWENS LAW FIRM, P.C. | |

Counsel for George's Inc. & George's Farms, Inc.

| | |
|-------------------|------------------------|
| A. Scott McDaniel | smcdaniel@mhla-law.com |
| Nicole Longwell | nlongwell@mhla-law.com |

Philip Hixon
Craig A. Merkes
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

phixon@mhla-law.com
cmerkes@mhla-law.com

Sherry P. Bartley
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC
Counsel for Peterson Farms, Inc.

sbartley@mwsgw.com

John Elrod
Vicki Bronson
P. Joshua Wisley
Bruce W. Freeman
D. Richard Funk
CONNER & WINTERS, LLP
Counsel for Simmons Foods, Inc.

jelrod@cwlaw.com
vbronson@cwlaw.com
jwisley@cwlaw.com
bfreeman@cwlaw.com
rfunk@cwlaw.com

Stephen L. Jantzen
Paula M. Buchwald
Patrick M. Ryan
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Thomas C. Green
SIDLEY, AUSTIN, BROWN & WOOD LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
tcgreen@sidley.com

Robert W. George
Michael R. Bond
Erin W. Thompson
KUTAK ROCK, LLP
Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.

robert.george@kutakrock.com
michael.bond@kutakrock.com
erin.thompson@kutakrock.com

R. Thomas Lay
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

Jennifer Stockton Griffin
David Gregory Brown
LATHROP & GAGE LC
Counsel for Willow Brook Foods, Inc.

jgriffin@lathropgage.com

Robin S Conrad

rconrad@uschamber.com

NATIONAL CHAMBER LITIGATION CENTER

Gary S Chilton gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC
Counsel for US Chamber of Commerce and American Tort Reform Association

D. Kenyon Williams, Jr. kwilliams@hallestill.com
Michael D. Graves mgraves@hallestill.com
Hall, Estill, Hardwick, Gable, Golden & Nelson
Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.

Richard Ford richard.ford@crowedunlevy.com
LeAnne Burnett leanne.burnett@crowedunlevy.com

Crowe & Dunlevy
Counsel for Oklahoma Farm Bureau, Inc.

Kendra Akin Jones, Assistant Attorney General Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General Charles.Moulton@arkansasag.gov

Also on this 21st day of December, 2007 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage LC
314 E HIGH ST
JEFFERSON CITY, MO 65101

Thomas C Green
Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Cary Silverman
Victor E Schwartz
Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

C Miles Tolbert
Secretary of the Environment
State of Oklahoma

3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

Gary V. Weeks
Bassett Law Firm
P. O. Box 3618
Fayetteville, AR 72702

Dustin McDaniel
Justin Allen
Office of the Attorney General (Little Rock)
323 Center St, Ste 200
Little Rock, AR 72201-2610

/s/ Richard T. Garren